CLERK'S COPY. 14480

945
S.C.

TRANSCRIPT OF RECORD,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 350.

JOHN BAD ELK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

FILED JULY 14, 1899.

(17464.)

14481
78-449
V55c
1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 350.

JOHN BAD ELK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

INDEX.

	Original.	Print.
Citation and service	1	1
Writ of error	2	1
Return on writ of error	2½	2
Caption	3	2
Presentment of indictment	3	2
Indictment	4	3
Order remitting cause to circuit court	6	4
Certificate of clerk of district court	7	4
Arraignment and plea	8	5
Order beginning trial	10	5
Order continuing trial	11	6
Order continuing trial	12	6
Order concluding trial	13	7
Verdict	14	7
Order taking motion in arrest under advisement	14	7
Order overruling motion in arrest of judgment	15	8
Judgment and sentence	15	8
Order allowing time to prepare bill of exceptions	16	8
Bill of exceptions	17	9
Evidence for plaintiff	17	9
Testimony of B. J. Gleason	17	9
High Eagle	20	11
Lone Bear	21	11
Pine Bird	23	12
Shouts At	24	13

BLEED. THROUGH POOR COPY

	Original.	Print.
Bill of exceptions—Continued.		
Evidence for plaintiff—Continued.		
Testimony of Alfred Old Shield	24	13
Under the Baggage	25	14
Steel Horses	25	14
Dog Chief	25	14
Dr. Jas. R. Walker	25	14
Evidence for defendant	26	14
Testimony of John Bad Elk	26	14
Harrison White Thunder	28	15
Defendant's requests to charge	29	16
Charge of the court	31	17
Exceptions to charge	37	20
Judge's certificate to bill of exceptions	37	20
Order allowing writ of error	38	21
Assignment of errors	40	21
Petition for writ of error	43	23
Order allowing writ of error	46	24
Clerk's certificate	47	25

1 *Citation.*

UNITED STATES OF AMERICA, ss:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of South Dakota, wherein John Bad Elk is plaintiff in error and the United States is defendant in error, to show cause on the second Monday of October next in said Supreme Court, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

JOHN E. CARLAND, *District Judge.*

Dated May 19th, 1899.

Due service of the foregoing citation and of a copy thereof admitted this 19th day of May, A. D. 1899.

JAMES D. ELLIOTT,
United States Attorney.

W. G. PORTER,
Asst. U. S. Att'y.

(Indorsed:) Citation. Filed May 19, 1899. Oliver S. Pendar, clerk.

2 *Writ of error.*

UNITED STATES OF AMERICA, ss.:

The President of the United States, to the honorable judges of the circuit court of the United States for the district of South Dakota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court, before you, or some of you, between the United States, plaintiff, and John Bad Elk, defendant, a manifest error hath happened to the great damage and injury of the said John Bad Elk, defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, within sixty days from the date hereof, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

BLEED. THROUGH POOR COPY

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] OLIVER PENDAR,
Clerk of the Circuit Court of the United States
for the District of South Dakota.

Allowed by

JOHN E. CARLAND, *Judge.*

2½ UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of South Dakota, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the circuit court of the United States within and for the district of South Dakota, at office in the city of Sioux Falls, this 28th day of June, A. D. 1899.

[SEAL.] OLIVER PENDAR, *Clerk.*

(Indorsed:) Writ of error. Filed May 19, 1899. Oliver S. Pendar, clerk.

3 In the circuit court of the United States within and for the district of South Dakota.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } Southern division. Docket No. 336.

Be it remembered that on the 5th day of April, A. D. 1899, an indictment against said defendant, John Bad Elk, for the crime of murder, was remitted into this court by the district court of the United States for this district, and said indictment, together with a transcript of the record of said district court, was filed in the office of the clerk of this court, which said indictment and record of said district court is the following, to wit:

In the district court of the United States within and for the district of South Dakota.

UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } Southern division. Docket No. 697.

Be it remembered that on the 5th day of April, A. D. 1899, the following proceedings were had and made of record on folio 438, Journal "D," of said court in the above-entitled case, to wit:

Now come the grand jury, twenty-three being present, and by their foreman, and in their presence, do present to the court:

(No. 697.) An indictment against John Bad Elk, charging him with the crime of murder.

Which said indictment is duly filed by the clerk, and the grand jury, having further business before them, retire.

4 Which said indictment is the following, to wit:

District court of the United States of America for the southern division of the district of South Dakota, in the eighth judicial circuit.

At a stated term of the district court of the United States of America for the southern division of the district of South Dakota, begun and held at the city of Sioux Falls, within and for the district and circuit aforesaid, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and ninety-nine.

The grand jurors of the United States of America, good and lawful men, summoned from the body of the southern division of the district aforesaid, then and there being duly empanneled, sworn, and charged by the court aforesaid to diligently inquire and true presentment make, for said district of South Dakota in the name and by the authority of the United States of America, upon their oaths do present:

That John Bad Elk, an Indian of the Sioux tribe of Indians, late of the Pine Ridge Indian Reservation, in said district, heretofore, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at the Pine Ridge Indian Reservation, in the district aforesaid, and within the exclusive jurisdiction of this court, in and upon one John Kills Back, unlawfully, wilfully, feloniously, and of his malice aforethought did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six-shooter, then and there loaded and charged with gunpowder and leaden

5 bullets, which said revolver he, the said John Bad Elk, then and there held in his hand, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, out of the revolver aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk, discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him, the said John Kills Back, a little to the left of the centre of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound; giving to him, the said John Kills Back, then and there, with a leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and upon the body of him, the said John Kills Back, a little to the left of the center of the body in front and and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which said mortal wound, he, the said John Kills Back, then and there on the same day, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said John Bad Elk, him, the said John Kills Back, in the manner and form, and by the means aforesaid, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder, contrary

BLEED. THROUGH POOR COPY

to form, force, and effect of the statute of the United States
6 in such case made and provided, and against the peace and dignity of the United States of America.

JAMES D. ELLIOTT,
United States Attorney.

Names of witnesses sworn and examined before the grand jury: High Eagle, Lone Bear, B. J. Gleason, J. R. Walker, R. O. Pugh, Alfred Old Shield, Shouts At, Pine Bird, Chief Dog, Brings Plenty, Steals Horses.

(Endorsed:) Remitted into the U. S. circuit court by order of the U. S. district court and filed this 5th day of April, 1899. Oliver S. Pendar, clerk U. S. circuit court, district of South Dakota.

No. 697. The United States vs. John Bad Elk. Indictment for murder. A true bill. C. S. Blodgett, foreman. Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed as a record of this court this 5th day of April, A. D., 1899. Oliver S. Pendar, clerk. James D. Elliott, U. S. attorney, district of South Dakota.

And afterwards, to wit, on the same day, i. e., April 5th, 1899, the following proceedings were had and made of record in said court, on folio 438, Journal "D" thereof, in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } Ind. No. 697, S. D.

7 Whereas, an indictment was presented to said district court of the United States of America within and for the district of South Dakota by the grand jury of said United States district court, at Sioux Falls, South Dakota, on this 5th day of April, A. D. 1899, against John Bad Elk, charging him with the crime of murder:

Now, therefore, in accordance with section 1039 of the Revised Statutes of the United States, it is hereby ordered that the said indictment, together with all the files in said case, be remitted forthwith to the circuit court of the United States for the district of South Dakota, at the April term, A. D. 1899, of said court; and the clerk of this court is hereby directed to enter this order in the minutes of the court, as provided by law, and to transmit a transcript of this order, and all proceedings heretofore had in this court in said case, together with the indictment and files in this case, to the clerk of the circuit court of the United States of the district of South Dakota, to be by him filed and entered of record in his office according to law.

UNITED STATES OF AMERICA, *set:*

I, Oliver S. Pendar, clerk of the district court of the United States within and for the district of South Dakota, do hereby certify that the foregoing is a true and correct copy of the entry of the presentment of the indictment, and the order of court remitting the same to the circuit court of the United States for the district of South Dakota, and that the

indictment in said case, to wit, the United States vs. John Bad Elk, annexed hereto is the original indictment referred to and filed in said district court, and I do hereby remit said original indictment, together
8 with the transcript of the record in said district court, in said case, to the circuit court of the United States within and for the district of South Dakota, pursuant to the order of said district court.

In witness whereof I hereunto subscribe my name as clerk of the district court of the United States within and for the district of South Dakota, and affix the seal of said court, at Sioux Falls, in said district, this 5th day of April, A. D. 1899.

[OFFICIAL SEAL.] OLIVER S. PENDAR, *Clerk.*

(Endorsed.) No. 326. U. S. circuit court, district of South Dakota. The United States vs. John Bad Elk. Original indictment, together with district court record. Filed April 5, 1899. Oliver S. Pendar, clerk.

And afterwards, to wit, on the 5th day of April, A. D., 1899, the following proceedings were had and made of record of said court, on folio , journal in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } Southern Division, Docket No. 336.

Arraignment and plea.

Now comes said defendant, in the custody of the U. S. marshal, and comes his attorney, S. B. Van Buskirk, esq., and now the assistant U. S. attorney, moves his arraignment; thereupon Charles
9 Merrivale is duly sworn as interpreter, and now the indictment is read in open court, by W. G. Porter, esq., assistant U. S. district attorney, and the same is interpreted to the defendant, who answers that he has been indicted by his true name, and said defendant, John Bad Elk, then and there enters his oral plea, through his interpreter, of not guilty to said indictment.

And afterwards, to wit, on the 13th day of April, A. D. 1899, said case came on for trial before the court and a jury, and was duly tried commencing on said date, and following days, as appears by the record of said court, entered in the journal thereof on April 13, 14, 15, 17, in words and figures the following, to wit:

10 THURSDAY, *April 13th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } # 336.

On this day come the United States of America, plaintiff, by James D. Elliot, esq., attorney for the district of South Dakota, and Wm. G. Porter, esq., his assistant, and comes the said defendant, John Bad Elk, in custody of the marshal, and by his attorney, S. B. Van Buskirk, esq., and it appearing from the returns of the marshal that the said defendant

BLEED. THROUGH POOR COPY

has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn, pursuant to the statutes of the United States, for the present term of this court, more than two entire days heretofore; now, on motion of the plaintiff, by its said attorney, it is ordered that a jury come to try the issue joined:

Whereupon the following were selected for trial of this cause, to wit: Willis Mayne, J. O. Terrill, Ed. Baldwin, Charles Searls, Joseph Kotsba, A. B. Green, C. H. Capps, J. M. Blunt, Ira Howard, Samuel Dickey, J. R. Petrie, L. B. Goodell; twelve good and lawful men of the southern division of the district aforesaid, duly selected, empanneled, and sworn to try the issues joined, and a true verdict render, according to the law and the evidence.

Time for adjournment having arrived, further proceedings on the trial of this cause are continued until the opening of the court to-morrow morning.

11 FRIDAY, *April 14th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant is present in the custody of the marshal, and the trial proceeds as follows:

W. G. Porter, esq., opens the case on behalf of the plaintiff.

Chas. Merrivale is selected and duly sworn as interpreter for the purposes of this trial.

High Eagle is sworn and examined on behalf of the plaintiff.

B. J. Gleason is sworn and examined on behalf of the plaintiff.

Lone Bear is sworn and examined on behalf of the plaintiff.

Pine Bird is sworn and examined on behalf of the plaintiff.

Shouts At is sworn and examined on behalf of the plaintiff.

Alfred Old Shield is sworn and examined on behalf of the plaintiff.

Under The Baggage is sworn and examined on behalf of the plaintiff.

Brings Plenty is sworn and examined on behalf of the plaintiff.

Steals Horses is sworn and examined on behalf of the plaintiff.

Shouts At is recalled and further examined on behalf of the plaintiff.

Chief Dog is sworn and examined on behalf of the plaintiff.

12 Time for adjournment having arrived, and the trial of this cause not being completed, it is ordered that further proceedings herein be continued until to-morrow morning at the opening of court.

SATURDAY, *April 15th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant

is present in the custody of the U. S. marshal, and the trial proceeds as follows:

Geo. H. Purvis is sworn and examined on behalf of the plaintiff.

Dr. James R. Walker is sworn and examined on behalf of the plaintiff.

Here plaintiff rests.

Now, by permission of the court, witness Under The Baggage is recalled and cross-examined on behalf of the defendant.

S. B. Van Buskirk, esq., opens the case on behalf of the defendant.

John Bad Elk, the defendant, is sworn and examined on his own behalf.

Harrison White Thunder is sworn and examined on behalf of the defendant.

13 Here the defendant rests.

High Eagle is recalled and examined on behalf of the plaintiff in rebuttal.

Shouts At is recalled and examined on behalf of the plaintiff in rebuttal.

Here both sides rest.

S. B. Van Buskirk, esq., sums up the case to the jury on behalf of the defendant.

Jas. D. Elliott, esq., sums up the case to the jury on behalf of the plaintiff.

Now, the time for adjournment having arrived, further proceedings are continued until Monday, April 17th, A. D. 1899, at ten o'clock in the forenoon.

MONDAY, *April 17th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF, }
vs. } = 336.
JOHN BAD ELK, DEFENDANT. }

This day again come the parties to this cause, by their respective attorneys, also the jury heretofore empanneled and sworn; the defendant is present in the custody of the marshal, and the trial proceeds as follows:

And the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retired at 10:30 o'clock in the forenoon, to consider of their verdict, in custody of bailiffs for the purpose especially sworn.

Now, at 12.00 o'clock m., comes the said jury into court, the defendant is present in the custody of the marshal, with his attorney, and

14 the said jury return their verdict in writing, as follows, to wit:

We, the jury, find the defendant guilty as charged in the indictment.

Dated April 17, 1899. I. R. HOWARD, *Foreman.*

Which said verdict is then and there entered of record and the jury discharged from further consideration of the case; and it is ordered that said defendant, John Bad Elk, be committed to the custody of the United States marshal pending further proceedings in this case.

BLEED. THROUGH POOR COPY

And afterwards, to wit, on the 18th day of April, A. D. 1899, the following proceedings were had and made of record in said court, as follows, to wit:

TUESDAY, *April 18th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } # 336.

This matter comes on for hearing this day, upon defendant's motion in arrest of judgment, filed this day; the defendant is present in the custody of the marshal, and with him his attorney, S. B. Van Buskirk, esq., and now the said motion is argued to the court by counsel, S. B. Van Buskirk, esq., arguing on behalf thereof and J. D. Elliott, esq., in opposition thereto; whereupon the court reserves its ruling and takes the matter under advisement.

Now, on motion of the district attorney, it is ordered that
15 the time be fixed for pronouncing sentence at the opening of court to-morrow morning.

And afterwards, to wit on the 19th day of April, A. D. 1899, an order was made overruling the motion in arrest of judgment; whereupon the judgment and the sentence of the court was pronounced in said case by the court, and thereafter an order was made granting time to prepare and settle the defendant's bill of exceptions herein; which said orders and sentence of the court was duly entered of record in the journal of said court in words the following, to wit:

WEDNESDAY, *April 19th, A. D. 1899.*

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } # 336.

The defendant's motion in arrest of judgment having been heretofore argued by counsel and submitted to the court now at this time, said defendant being present in the custody of the marshal, with his attorney, S. B. Van Buskirk, esq., it is ordered by the court that said motion in arrest of judgment be, and the same is hereby, overruled.

To the entry of which order the defendant, by his counsel, then and there excepts; which exception is duly allowed by the court.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336. Southern division. Convicted of murder.

Now, on this 19th day of April, A. D. 1899, the United States district attorney and the above-named defendant, John Bad Elk, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the conviction of the crime of murder,
16 as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him. And

the said defendant now answers that he has no cause to show, and the said defendant having been duly convicted of the crime of murder, in said United States circuit court for the district of South Dakota—

It is now by the court here considered, ordered, and adjudged, and the sentence of the court is that you, John Bad Elk, be remanded to the common jail of the county of Minnehaha, within the State of South Dakota, and there safely kept until the 16th day of June, A. D. 1899.

And that on said day you be taken by the marshal of the United States for the district of South Dakota to some private and convenient place within the county of Minnehaha, of the State of South Dakota, and then and there, between the hours of eight o'clock a. m. and four o'clock p. m. of said day, be, by the said marshal, hung by the neck until you are dead.

THE UNITED STATES, PLAINTIFF, *vs.* JOHN BAD ELK, DEFENDANT. } = 336.

On motion of the defendant, by his attorney, S. B. Van Buskirk, esq., it is ordered that forty days be granted from this date within which defendant may prepare, serve, and settle his bill of exceptions herein.

And, to wit, on the same day the bill of exceptions is duly allowed by the judge and filed in the clerk's office, which said bill of exceptions is in words and figures the following, to wit:

17 United States of America, in circuit court, district of South Dakota, southern division.

UNITED STATES OF AMERICA *vs.* JOHN BAD ELK. } Bill of exceptions. Indictment for murder.

Be it remembered that at the April term of said court, A. D. 1899, to wit, on the 14th day of April in the year aforesaid, being at a regular term of said court begun and holden at the city of Sioux Falls, in said district, before his honor, John E. Carland, judge of the district court for said district, sitting and holding said court, the said cause come on for trial upon the indictment returned and filed therein and the plea of not guilty on the part of said defendant; and a jury duly empanneled and sworn to try said issue, and the plaintiff appearing by its attorney, James D. Elliott, United States attorney for said district, and the defendant in his own proper person and by his attorney, S. B. Van Buskirk, the following proceedings were had:

Captain B. J. GLEASON, being called by the plaintiff and being duly sworn, testified as follows:

For about two years prior to the 13th day of March last I have been additional farmer on the Pine Ridge Reservation, in South Dakota.

The defendant was a policeman in my district, and resided with his wife in a cottage near to the subagency buildings where I resided and had charge. I was instructed by the agent in charge of the Pine Ridge

BLEED. THROUGH POOR COPY

Indian Agency to order the Indian policeman under my charge to arrest any Indian charged with any violation of the rules and regulations prescribed by the Commissioner of Indian Affairs and cause them to be taken to the agency.

18 On the 8th day of March last I heard a couple of shots at or near where the defendant resided. I came down to my house; went in, and passed out of the side door of my house. As I stepped out of the door the defendant was passing. I asked him if he shot. He said that he did. I asked him what he shot for. He said that he shot into the air for fun. I said to him, "Come around to the office in a little while and we will talk the matter over." I had always found defendant to be truthful, and gave the matter but little thought at the time; but a complaint was made to me with relation to the defendant. He did not come to the office for several days.

Question. Did you give directions to Lone Bear and Crow, two policemen, on the 13th day of March last to arrest the defendant?

(To which question defendant, by his counsel, objected for the reason that the question is immaterial and incompetent, and that the testimony does not show that the witness had any power or authority to direct the arrest of the defendant, nor that he had violated any law of the United States or any rule or regulation of the Indian Department. Neither does it appear any process has been issued directing the arrest of the defendant.

Which objection was then and there overruled by the court; to which ruling of the court the defendant then and there duly excepted, which exception was then and there allowed by the court.)

Answer. I ordered Lone Bear and Crow, two policemen, to go and arrest the defendant. I gave a letter to Lone Bear, directed to Major Clapp, the agent at Pine Ridge, and told him to take the defendant to the agency at Pine Ridge.

The defendant was at this time stopping at his mother's, a

19 short distance from the subagency of which I had charge.

Crow not being there, Lone Bear and High Eagle went to make the arrest. This was in the afternoon of the 13th day of March last.

They went to defendant's mother's, where he was stopping; came back and reported that he was not there. I ordered them to return and wait for him and arrest him. They returned to make the arrest, but came back and reported that the defendant had gone to his brother's to get a horse, and said that he would go with them to the agency in the morning; that it was too late to go that night. I then told them to watch him and see that he did not go away, and in the morning to take him to the agency at Pine Ridge.

It is about twenty-five miles from where the defendant was stopping to Pine Ridge Agency.

I directed Lone Bear and Crow to report to me on Monday morning, March 13. Crow failed to report. I directed Lone Bear to have High Eagle assist him in the arrest, and I notified John Kills Back, the deceased, to relieve Bad Elk as school policeman and to assist Lone Bear and High Eagle to arrest defendant.

It was getting dark about the time that Lone Bear, High Eagle, and

John Kills Back, the deceased, started for the defendant's mother's place, where he was stopping the last time just before the killing of the deceased.

Soon afterwards I heard some shots fired and heard a man groan. A report soon came that John Kills Back had been shot and killed. I sent some parties to bring in his body. These parties returned in a short time with his body. He was dead when they arrived with the body at the schoolhouse near my office. He was killed on the Pine Ridge Reservation in South Dakota.

20 Cross-examination:

The directions that I gave for the arrest of the defendant and for watching him and seeing that he did not get away was not in writing; was given orally.

HIGH EAGLE, being called by the plaintiff, and being duly sworn, testified as follows:

I am a policeman at Pine Ridge Reservation. When Lone Bear and I were ordered to go and arrest John Bad Elk, the defendant, Lone Bear went along a little ahead of me to where defendant was stopping. When we got there defendant was not at his mother's. We then went back and reported to Captain Gleason. He sent us back to find and get the defendant. We then returned, and as we were going back saw the defendant coming towards his mother's place. When we arrived there Lone Bear remained outside and I went into the house. The defendant had just returned from looking after the schools, which was a part of his duties as a policeman. When I went into the house he was smoking. I told him that we had come to take him to the agency at Pine Ridge. He refused to go and I went outside. Then Lone Bear went into the house. Lone Bear and the defendant came out, and the defendant saddled his horse and went over to Harrison White Thunder's.

We followed along some distance after him and John Kills Back and I stopped at a house and Lone Bear rode along to Harrison White Thunder's, where the defendant had gone. After stopping there for a while the defendant rode back to his mother's, and Lone Bear, John Kills Back, and I rode along a distance behind him, not very close. Defendant stopped on the road home and got a Winchester rifle and took home with him.

We rode back to the place where Captain Gleason was and told him that the defendant had been to his brother's to get a horse and that he said that he would go to Pine Ridge Agency with us in the morning. He told us to put out our horses, get our suppers, and then go and
21 watch the defendant and see that he did not go away, and to take him to Pine Ridge Agency in the morning.

Lone Bear, John Kills Back, and I, after getting our supper, started to the place where the defendant was stopping. On the way there Lone Bear stopped for a few minutes and John Kills Back and I went on. When we got near the house we saw Pine Bird and Shouts At standing near the house. When we got near the house we stopped, and presently the defendant came out and said, "What you here for bothering me?" John Kills Back says, "Cousin, you are a policeman and know what the rules and orders are." He said, "Yes; I know what the rules and orders are,

BLEED. THROUGH POOR COPY

but I told you that I would go with you to Pine Ridge in the morning." Then he shot and hit John Kills Back and fired another shot that hit my coat near the breast and another one that hit my pants leg, and then I ran away. When the defendant shot John Kills Back, the hands of John Kills Back were hanging down straight by his sides and he had no belt on.

Cross-examination:

The defendant was a policeman at the time of the shooting. He had been attending that day to the schools up and down the creek near the farmers; that was a part of his duties as such policeman.

LONE BEAR, being called and duly sworn on the part of the plantiff, testified as follows:

I am a policeman at Pine Ridge Reservation; was on duty at station under the charge of Captain Gleason. He directed me to arrest John Bad Elk on the 13th day of March last, and gave me a letter to give to Major Clapp, agent at Pine Ridge Agency.

I was to go with Crow to arrest Bad Elk, but he was away, and so High Eagle went in his place. We went up there and did not find
22 defendant at his mother's. We then went back and reported to Captain Gleason. He told us to go back and arrest him. We started back. On the way we saw the defendant riding home to his mother's place. When we got there I stayed outside and High Eagle went in. He came out and then I went in. Defendant was smoking. I told him that we had come to take him to Pine Ridge Agency. He said, "All right, I will go with you, but the horse is used up, and I shall have to go to my brother's and get a horse, and we will start in the morning. It is too late to start to-night." Then he went out and saddled his horse and started to Harrison White Thunder's to get a horse. I followed
23 after. When he got to his brother's his horses were out on the range and his brother said as soon as they came in he would bring the horse over.

We then started back, John Bad Elk going ahead, and I followed on after; John Bad Elk went to his mother's place, and we, John Kills Back and High Eagle and I, went down to the station and told Captain Gleason that John Bad Elk said that it was too late to go now, and that he had been to his brother's to get a horse, and that he said that he would go with us in the morning. Captain Gleason then said to us to go and keep watch of him and see that he did not go away and take him to Major Clapp at Pine Ridge in the morning.

We, John Kills Back, High Eagle, and I, started to where John Bad Elk was stopping. It was getting dark by this time. I stopped for a few moments just before we got to the house, and John Kills Back and High Eagle went on ahead pretty soon, and before I got up to where they were some shots were fired, and High Eagle came running by me and I fired and turned and ran.

Cross-examination:

John Bad Elk did not refuse to go with me to Major Clapp's at Pine Ridge Agency any of the time, but said all the time that he would go in the morning; that it was too late to start that night.

He did not get back from attending to his duties with the schools *schools* up and down the creeks until after four o'clock in the afternoon of March 13th last.

John Kills Back and High Eagle and I had our arms with us when we went up to where the defendant was at the time the shooting was done.

PINE BIRD, being called by the plaintiff and being duly sworn, testified as follows:

Just before the shooting was done I stepped out of my house close by where the defendant was stopping and found Shouts At there. We were standing near together and facing High Eagle and John Kills Back as they came up near the house where defendant was stopping and but a step or two away from them. Just then John Bad Elk came out near where we were standing and asked them "What you here for, bothering me all the time?" John Kills Back said, "Cousin, you are a policeman and know what the rules and orders are." John Bad Elk said, "Yes; I know what the rules and orders are. Did I not tell you that I
24 would go with you in the morning?" Just then John Kills Back turned sideways and moved a little forward and then John Bad Elk fired and hit John Kills Back, and he jumped and ran a little ways and fell down and got up and ran a little farther and fell down and groaned and asked for a drink of water. John Bad Elk fired another shot immediately after the first one and then High Eagle ran away.

SHOUTS AT, being called by the plaintiff and duly sworn, testified as follows:

In the evening just before the shooting I was standing outside my house with Pine Bird, when John Kills Back and High Eagle came walking towards the house where John Bad Elk was stopping. They came up within two or three steps of us. We were facing them. Just then John Bad Elk came out of the house near where Pine Bird and I was standing, and asked them, "What you bothering me all the time for." John Kills Back said, "Cousin, you are a policeman and know the rules and orders." Bad Elk said, "Yes; I know the rules and orders. Did I not tell you that I would go with you in the morning?" Just then John Kills Back moved a little and John Bad Elk fired. John Kills Back ran past the end of a wagon box near a fence and fell. Then he got up and went a little farther and fell down again and called for some one to bring him a drink of water. After a little I went out to where he was. He died in a few minutes. Immediately after John Bad Elk fired the shot that hit John Kills Back he fired again, and High Eagle ran away towards Lone Bear. I did not see John Kills Back have a revolver.

In a short time some men (policeman) came up from Mr. Gleason's and took the body down to the schoolhouse near Mr. Gleason's house.

Cross-examination:

The shooting was after dark. There was quite an amount of snow on the ground. Just beyond the corner of the wagon box where John Kills Back fell near the fence there was a bank of snow. A day or two after the shooting, where John Kills Back fell and his hand went into the snow I found his revolver.

BLEED. THROUGH POOR COPY

ALFRED OLD SHIELD, being called by the plaintiff and being duly sworn, testified as follows:

I was in the house where defendant John Bad Elk was after he came back from his brother's, and I saw him put a cartridge into the Winchester rifle that he brought with him when he came from Harrison
25 White Thunder's. It was not the house where he stopped and where his mother lived, but close by it.

UNDER THE BAGGAGE, being called on the part of the plaintiff and duly sworn, testified as follows:

After the shooting and the same evening John Bad Elk came into my house. I said to him, "You have done something bad; now you give me that revolver," he said "yes" and handed it to me.

BRINGS PLENTY, being called on behalf of the plaintiff and duly sworn, testified as follows:

During the afternoon preceding the shooting in the evening John Bad Elk was at my house. I live between Harrison White Thunder's and the place where John Bad Elk's mother lives. The big gun [pointing to the Winchester rifle produced in court] is my gun.

STEEL HORSES, being called on the part of the plaintiff and duly sworn, testified as follows:

John Bad Elk came to my house the next morning after the shooting of John Kills Back. This was about seven miles from where the shooting occurred. After he had been there a short time the policemen came in sight. I went to them and then went back to John Bad Elk and told him what they were there for. Then the policemen came up and we all went into the house and sat down and talked a little while, and the defendant gave his gun (the Winchester rifle) to one of the policemen.

DOG CHIEF, being called on the part of the plaintiff and being duly sworn, testified as follows:

I am a policeman at Pine Ridge Agency. I arrested John Bad Elk the morning after the shooting at Steel Horses. He had a gun (Winchester rifle). He delivered up the gun and went with us to Captain Gleason's office at the subagency.

Dr. JAMES R. WALKER, being called on the part of the plaintiff and being duly sworn, testified as follows:

26 I am a regular practicing physician and surgeon. I am located at Pine Ridge Agency as agency physician. I made a post mortem examination of John Kills Back the next day after he was killed. The bullet or cartridge entered his body a little to the left of the center in front and about two inches below the edge of the tenth rib, passed through the body, cutting the aorta from which he bled to death.

And thereupon the plaintiff rested its case.

Defendant's testimony.

Whereupon the attorney for the defendant called JOHN BAD ELK, the defendant, who being duly sworn in his own behalf, testified as follows:

I am the defendant in this action. I knew John Kills Back, who was shot and killed at the Pine Ridge Reservation on the 13th day of March last.

I was a policemen there at that time. During that day I had been looking after the schools along the creek near the station. That was my duty as such policeman. I arrived home at my mother's about half past four in the afternoon. Soon after I arrived at my mother's house High Eagle came into the house, stayed a minute or two, but did not speak; then went outdoor, and Lone Bear came in and said that he was directed to take me to Pine Ridge to Major Clapp. I said, "All right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder, and get another horse." Lone Bear said all right. Then I went out, saddled my horse, and started for my brother's, and Lone Bear followed some distance after. When I got to my brother's house his horses were out on the range, and he said that when they came in that he would bring one down to me.

I then started back after Lone Bear, and I got some coffee and he came along some distance behind me. We did not ride side by
27 side or close together. On my way back I stopped at Brings Plenty's and got a Winchester rifle. It was the same as that shown here in court and shown other witnesses. I got it to shoot prairie chickens with I went from there to where I was stopping. I threw the gun on to the house and put out my horse and went in. There were some children playing with some cartridges in the house. I then went out and got the gun and tried one of the cartridges to see if they would fit it, but they would not; then I threw the gun under the bed.

After I had been at my mother's a short time my brother, Harrison White Thunder, came with the horse. He told me that John Kills Back was coming with a bad heart. He left the horse and went down towards the farmer's. I did not see him again that evening. After he had been gone a little while I went outdoor and saw John Kills Back and High Eagle and Pine Bird and Shouts At near the house. I asked John Kills Back and High Eagle what they were there bothering me all the while for. John Kills Back said, "You are a policeman and know what the rules are." I said, "Yes; I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning." Then he moved a little forward and put his hand around as if to reach for his gun. I saw the gun and shot; then I shot twice more, and John Kills Back and High Eagle ran off. John Kills Back fell after he had gone a short distance. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time that I shot.

I stayed about there until morning, when I started to go to the farmer, Mr. Gleason's. After I had gone a short distance I saw a lot of policemen coming, armed. Then I turned and rode off up the creek about seven miles and came to an Indian's by the name of Steel Horses.
28 I talked with him a short time, and then we started towards the farmer's. After going a little ways we saw the policemen coming,

BLEED. THROUGH POOR COPY

and then went back. Steel Horses went out to the policemen and stopped and talked, and then came back and said that they had come to arrest, not shoot me. Then we all went into the house, sat down, and talked a while, and I gave up my gun to one of the policemen. I had a cartridge in my gun. I took it out, and then we went to the farmer's.

Cross-examination:

John Kills Back and High Eagle did not go with me to my brother's, Harrison White Thunder. They stopped before they got there, at a house. Lone Bear came to my brother's while I was there. We got some coffee there.

We did not go back together to my mother's. I went ahead and he came after me after I had started. Not very close.

I did not see John Kills Back or High Eagle on my way back. I only saw Brings Plenty and a man driving through a ravine or cut on my way back. I got that gun (Winchester rifle) at Brings Plenty's; I carried it on my saddle. I got it to kill some pra'rie chickens with. My brother came with the horse just at dusk. He put it in the corral, a short distance from the house.

HARRISON WHITE THUNDER, being called on the part of the defendant and being duly sworn, testified as follows:

I know the defendant, John Bad Elk. He came to my house in the afternoon a short time before the shooting of John Kills Back, in the evening. While he was there Lone Bear came. My wife got them some coffee. John Bad Elk wanted to get a horse to ride to Pine Ridge Agency. My horses were out on the range. I told him when they were brought in I would bring it to him. I took it to him at his mother's place. I put it in the corral, near his mother's place. It was just
29 dark when I got there. I told John Bad Elk that John Kills Back was coming to arrest him.

I went from there down to the store at the station. I went from there home. I did not see him again that evening.

Cross-examination:

I did not see John Kills Back after John Bad Elk was at my place after the horse that evening.

And thereupon the defendant rested his case.

The gun used was the ordinary weapon furnished by the U. S. to Indian policemen.

And thereupon the defendant requested the court to give to the jury each of the following instructions, to wit:

1st. If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back that he had a design to take away his life, or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger, and the killing would be justifiable even though

it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done.

2nd. In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back you may properly take into consideration the fact that the defendant and the deceased were
30 Indians, together with the known habits, customs, and education of the Indians on the reservation from which they came and where they lived; and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so, with a bad heart.

3rd. Before you can properly convict the defendant of the charge contained in the indictment in this action you must be satisfied from the evidence submitted to you that there was not reasonable grounds for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased.

4th. The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury.

5th. From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

And thereupon the court denied the requests of the defendant to give said instructions to the jury, or either of them.

To which refusal of the court to give said instructions so requested by the defendant, and to each of them, the defendant then and there duly excepted.

And thereupon the court charged the jury as follows:

31 *Charge of the Court.*

GENTLEMEN OF THE JURY: The defendant, John Bad Elk, is now on trial before you and this court, charged with the crime of murder. It is alleged in the indictment that the defendant, John Bad Elk, an Indian of the Sioux tribe of Indians, late of the Pine Ridge Indian Reservation, in said district, heretofore, to wit, "on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at the Pine Ridge Indian Reservation, in the district aforesaid and within the exclusive jurisdiction of this court, in and upon one John Kills Back unlawfully, wilfully, feloniously, and of his malice aforethought, did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six-shooter, then and there loaded and charged with gunpowder and leaden bullets, which said

BLEED. THROUGH POOR COPY

revolver, he, the said John Bad Elk, then and there held in his hand, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, out of the revolver aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk, discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him the said John Kills Back, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound, giving to him, the said John Kills Back, then and there with a leaden bullet aforesaid, so as aforesaid, shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and
32 upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which said mortal wound he, the said John Kills Back, then and there on the same day, to wit, on the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine, died."

This is an action between the United States and the defendant, John Bad Elk. The jurisdictional questions are not in dispute. It appears from the evidence that the person killed and the person who did the shooting were both full-blood Indians, and residing upon the Pine Ridge Indian Reservation in this State.

The question principally to be determined by you, gentlemen of the jury, is whether or not the killing of John Kills Back by the defendant, John Bad Elk, was murder, or whether it was done in self-defense.

So far as this court is concerned, for the purpose of this case, the court charges you that the deceased, John Kills Back, was lawfully at the place where this killing occurred on the day in question. He was what is known as an "Indian policeman" upon that reservation. He was an officer who had been ordered to arrest the defendant. The defendant, John Bad Elk, also was a policeman upon that reservation, and, so far as the evidence shows, was entitled to be upon the reservation and at the place he was, and to be armed, so far as that is concerned. These two men met at that place where the killing occurred, and the investigation of this case principally requires an investigation of the facts as they existed immediately surrounding the killing.

The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he
33 was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. Now, what was the character of the crime committed by the defendant, if any, at the time and place in question? That requires the court to define to you the crime which is charged in the indictment. The crime charged in the indictment is what is known as "common-law murder.' Murder at the common law was when a person of sound memory and discretion

it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done.

2nd. In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back you may properly take into consideration the fact that the defendant and the deceased were
30 Indians, together with the known habits, customs, and education of the Indians on the reservation from which they came and where they lived; and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so, with a bad heart.

3rd. Before you can properly convict the defendant of the charge contained in the indictment in this action you must be satisfied from the evidence submitted to you that there was not reasonable grounds for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased.

4th. The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury.

5th. From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

And thereupon the court denied the requests of the defendant to give said instructions to the jury, or either of them.

To which refusal of the court to give said instructions so requested by the defendant, and to each of them, the defendant then and there duly excepted.

And thereupon the court charged the jury as follows:

31 *Charge of the Court.*

GENTLEMEN OF THE JURY: The defendant, John Bad Elk, is now on trial before you and this court, charged with the crime of murder. It is alleged in the indictment that the defendant, John Bad Elk, an Indian of the Sioux tribe of Indians, late of the Pine Ridge Indian Reservation, in said district, heretofore, to wit, "on the thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at the Pine Ridge Indian Reservation, in the district aforesaid and within the exclusive jurisdiction of this court, in and upon one John Kills Back unlawfully, wilfully, feloniously, and of his malice aforethought, did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six-shooter, then and there loaded and charged with gunpowder and leaden bullets, which said

BLEED. THROUGH POOR COPY

revolver, he, the said John Bad Elk, then and there held in his hand, then and there wilfully, unlawfully, feloniously, and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, out of the revolver aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk, discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him the said John Kills Back, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound, giving to him, the said John Kills Back, then and there with a leaden bullet aforesaid, so as aforesaid, shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and
32 upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which said mortal wound he, the said John Kills Back, then and there on the same day, to wit, on the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine, died."

This is an action between the United States and the defendant, John Bad Elk. The jurisdictional questions are not in dispute. It appears from the evidence that the person killed and the person who did the shooting were both full-blood Indians, and residing upon the Pine Ridge Indian Reservation in this State.

The question principally to be determined by you, gentlemen of the jury, is whether or not the killing of John Kills Back by the defendant, John Bad Elk, was murder, or whether it was done in self-defense.

So far as this court is concerned, for the purpose of this case, the court charges you that the deceased, John Kills Back, was lawfully at the place where this killing occurred on the day in question. He was what is known as an "Indian policeman" upon that reservation. He was an officer who had been ordered to arrest the defendant. The defendant, John Bad Elk, also was a policeman upon that reservation, and, so far as the evidence shows, was entitled to be upon the reservation and at the place he was, and to be armed, so far as that is concerned. These two men met at that place where the killing occurred, and the investigation of this case principally requires an investigation of the facts as they existed immediately surrounding the killing.

The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. It is claimed on the part of the defendant that he made no resistance, and he
33 was willing to go with the officer in the morning. I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency with him. Now, what was the character of the crime committed by the defendant, if any, at the time and place in question? That requires the court to define to you the crime which is charged in the indictment. The crime charged in the indictment is what is known as "common-law murder.' Murder at the common law was when a person of sound memory and discretion

unlawfully killeth any reasonable creature in being, and (in this case) under the peace of the United States, with malice aforethought, either express or implied. You will notice that the particular ingredient in that definition, which distinguishes this crime from all other kinds of homicide, is the malice aforethought which enters into the definition. That malice may be either express or implied. Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. That is express malice. Malice is implied from any deliberate, cruel act committed by one person against another, however sudden, as where a man kills another suddenly without any, or without a considerable, provocation, and with a deadly weapon.

If you believe from all the evidence in this case, beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side, and had done nothing further than to ask the defendant to come with him, and to say to the defendant
that he, defendant, knew the rules and orders of the reservation,
34 and without any other provocation the defendant took out his
revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have a reasonable doubt of the truth of the facts just stated, you should acquit; or if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him.

The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had went beyond the force necessary to arrest the defendant, and was about to kill him or to inflict
35 great bodily injury upon him, which was not necessary for the
purpose of making the arrest.

You must take the case, gentlemen of the jury, not as it would appear to you or to any of us now sitting here in cool calculation as to what right at the time. The defendant is entitled to have you place yourselves in his place and look at things as they appeared to him, bearing

BLEED. THROUGH POOR COPY

in mind the fact always that, in order to make out this defense of self-defense you must be satisfied that the defendant actually believed, and had good reason to believe, that the deceased was about to kill him or to do him great bodily injury.

You have a right, in determining this question of self-defense and with the character of this crime, to take into consideration the character of the Indian, whether or not his life and surroundings renders him more excitable and more apprehensive of danger from another Indian than would exist between two white men.

You will also take into consideration, on considering that question, that the defendant was also a policeman; that in reply to the deceased he said, "I do know the rules and orders," and whether or not, under all the circumstances of the case, he acted honestly and in good faith in the protection of his rights.

I have used the expression "reasonable doubt" in my instructions to you upon the law of this case, and in saying to you what the court considers would be a reasonable doubt I think the following will be as clear for your guidance as anything more elaborate that might be attempted:

"A juror would have a reasonable doubt if, after a careful comparison and consideration of all the evidence in the case, the juror could not say that he had an abiding conviction of the truth of the charge
36 to a moral certainty—a certainty upon which the juror would be willing to act in affairs of great importance to himself. Still, this doubt must be based upon reason and must arise from the consideration of the evidence in the case."

In this case, gentlemen of the jury, as in any other criminal case, the defendant enters upon the trial clothed with the presumption of innocence, and that presumption attends him through all the stages of the case up to the time you find him guilty beyond a reasonable doubt.

If you should find the defendant guilty your verdict would be guilty as charged in the indictment.

I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words without capital punishment.

Of course, if you find the defendant ought to be acquitted you will render a verdict of not guilty.

In charging the jury upon the law of the case the court took judicial notice of the rules and regulations prescribed by authority for the government of Indians upon Indian reservations.

37 *Defendant's exceptions to charge of court.*

Mr. VAN BUSKIRK. I desire to except to so much of the charge as advises the jury that the deceased had a right to make this arrest at the time this occurrence happened.

I also object to so much of the charge as advises the jury, under the evidence as it has been given in this case, that the policeman had a right to determine at what time the defendant should go to the agency.

I except to so much of the charge as advises the jury that the deceased had a right to show his revolver unless there was some occasion for it.

And I except to so much of the charge as advises the jury that if they find the defendant guilty they may find him guilty without capital punishment.

unlawfully killeth any reasonable creature in being, and (in this case) under the peace of the United States, with malice aforethought, either express or implied. You will notice that the particular ingredient in that definition, which distinguishes this crime from all other kinds of homicide, is the malice aforethought which enters into the definition. That malice may be either express or implied. Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. That is express malice. Malice is implied from any deliberate, cruel act committed by one person against another, however sudden, as where a man kills another suddenly without any, or without a considerable, provocation, and with a deadly weapon.

If you believe from all the evidence in this case, beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side, and had done nothing further than to ask the defendant to come with him, and to say to the defendant that he, defendant, knew the rules and orders of the reservation,
34 and without any other provocation the defendant took out his revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have a reasonable doubt of the truth of the facts just stated, you should acquit; or if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant he would have had the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be sufficient justification for the defendant to shoot him and kill him.

The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had went beyond the force necessary to arrest the defendant, and was about to kill him or to inflict
35 great bodily injury upon him, which was not necessary for the purpose of making the arrest.

You must take the case, gentlemen of the jury, not as it would appear to you or to any of us now sitting here in cool calculation as to what right at the time. The defendant is entitled to have you place yourselves in his place and look at things as they appeared to him, bearing

BLEED. THROUGH POOR COPY

in mind the fact always that, in order to make out this defense of self-defense you must be satisfied that the defendant actually believed, and had good reason to believe, that the deceased was about to kill him or to do him great bodily injury.

You have a right, in determining this question of self-defense and with the character of this crime, to take into consideration the character of the Indian, whether or not his life and surroundings renders him more excitable and more apprehensive of danger from another Indian than would exist between two white men.

You will also take into consideration, on considering that question, that the defendant was also a policeman; that in reply to the deceased he said, "I do know the rules and orders," and whether or not, under all the circumstances of the case, he acted honestly and in good faith in the protection of his rights.

I have used the expression "reasonable doubt" in my instructions to you upon the law of this case, and in saying to you what the court considers would be a reasonable doubt I think the following will be as clear for your guidance as anything more elaborate that might be attempted:

"A juror would have a reasonable doubt if, after a careful comparison and consideration of all the evidence in the case, the juror could not say that he had an abiding conviction of the truth of the charge
36 to a moral certainty—a certainty upon which the juror would be willing to act in affairs of great importance to himself. Still, this doubt must be based upon reason and must arise from the consideration of the evidence in the case."

In this case, gentlemen of the jury, as in any other criminal case, the defendant enters upon the trial clothed with the presumption of innocence, and that presumption attends him through all the stages of the case up to the time you find him guilty beyond a reasonable doubt.

If you should find the defendant guilty your verdict would be guilty as charged in the indictment.

I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words without capital punishment.

Of course, if you find the defendant ought to be acquitted you will render a verdict of not guilty.

In charging the jury upon the law of the case the court took judicial notice of the rules and regulations prescribed by authority for the government of Indians upon Indian reservations.

37 *Defendant's exceptions to charge of court.*

Mr. VAN BUSKIRK. I desire to except to so much of the charge as advises the jury that the deceased had a right to make this arrest at the time this occurrence happened.

I also object to so much of the charge as advises the jury, under the evidence as it has been given in this case, that the policeman had a right to determine at what time the defendant should go to the agency.

I except to so much of the charge as advises the jury that the deceased had a right to show his revolver unless there was some occasion for it.

And I except to so much of the charge as advises the jury that if they find the defendant guilty they may find him guilty without capital punishment.

I desire to except (it perhaps is not necessary) to the court's refusal to give the instructions asked by the defendant and to the refusal of the court to give each of said instructions. And because none of said exceptions so offered and made to the opinion and decision of said court do appear upon the record of said trial, therefore, on the prayer of the defendant, by his counsel, his honor the judge who presided at said trial and made said decisions hath settled and allowed these exceptions.

And the foregoing bill of exceptions contains all of the testimony bearing upon any exception taken, and the same is made a part of the record in this case.

JOHN E. CARLAND, [SEAL.]
U. S. District Judge.

(Endorsed:) United States circuit court. United States vs. John Bad Elk. Bill of exceptions. Filed May 19th, 1899. Oliver S. Pendar, clerk.

38 And afterwards, to wit, on the same day, the following, among other proceedings were entered of record in said court, in said cause, in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336.

Comes the defendant herein, by his attorney, S. B. Van Buskirk, esq., and represents to the court that he desires to sue out a writ of error in the above-entitled case to the Supreme Court of the United States, and that said defendant is absolutely without means of paying for a transcript of the record to be included in the return of such writ of error, nor for paying for the cost of filing, entering, and the issuing of all papers pertaining to said appeal in the clerk's office of this court.

Whereupon it is ordered that the clerk of this court shall file, enter, and issue all the necessary writs and make the proper returns thereon, at the cost of the United States, to enable the above-named defendant to have the sentence and judgment of this court entered against him reviewed by the Supreme Court of the United States.

39 And afterwards, to wit, on the same day, said defendant files his assignment of errors, which said assignment of errors are in words and figures the following, to wit:

40 United States of America, in circuit court, district of South Dakota, southern division.

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Assignment of errors.

Now comes the defendant, John Bad Elk, in his own proper person and by his attorney and counsel, S. B. Van Buskirk, and in connection with his petition for a writ of error and makes his *his* assignment of errors which he avers occurred upon the trial of said cause, as follows, to wit:

1st. The court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial against the

BLEED. THROUGH POOR COPY

objection of the defendant that on the 13th day of March, A. D. 1899, that he ordered and directed Lone Bear and another policeman to arrest your pe' for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back, that he had a design to take away his life or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable even though it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done."

3d. The court erred in refusing to charge the jury and give the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the known habits, customs, and education of the
41 Indians on the reservation from which they came and where they lived, and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased."

5th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger or that he was in imminent danger of suffering great bodily injury."

6th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

I desire to except (it perhaps is not necessary) to the court's refusal to give the instructions asked by the defendant and to the refusal of the court to give each of said instructions. And because none of said exceptions so offered and made to the opinion and decision of said court do appear upon the record of said trial, therefore, on the prayer of the defendant, by his counsel, his honor the judge who presided at said trial and made said decisions hath settled and allowed these exceptions.

And the foregoing bill of exceptions contains all of the testimony bearing upon any exception taken, and the same is made a part of the record in this case.

JOHN E. CARLAND, [SEAL.]
U. S. District Judge.

(Endorsed:) United States circuit court. United States vs. John Bad Elk. Bill of exceptions. Filed May 19th, 1899. Oliver S. Pendar, clerk.

38 And afterwards, to wit, on the same day, the following, among other proceedings were entered of record in said court, in said cause, in words and figures the following, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JOHN BAD ELK, DEFENDANT. } No. 336.

Comes the defendant herein, by his attorney, S. B. Van Buskirk, esq., and represents to the court that he desires to sue out a writ of error in the above-entitled case to the Supreme Court of the United States, and that said defendant is absolutely without means of paying for a transcript of the record to be included in the return of such writ of error, nor for paying for the cost of filing, entering, and the issuing of all papers pertaining to said appeal in the clerk's office of this court.

Whereupon it is ordered that the clerk of this court shall file, enter, and issue all the necessary writs and make the proper returns thereon, at the cost of the United States, to enable the above-named defendant to have the sentence and judgment of this court entered against him reviewed by the Supreme Court of the United States.

39 And afterwards, to wit, on the same day, said defendant files his assignment of errors, which said assignment of errors are in words and figures the following, to wit:

40 United States of America, in circuit court, district of South Dakota, southern division.

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Assignment of errors.

Now comes the defendant, John Bad Elk, in his own proper person and by his attorney and counsel, S. B. Van Buskirk, and in connection with his petition for a writ of error and makes his *his* assignment of errors which he avers occurred upon the trial of said cause, as follows, to wit:

1st. The court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial against the

BLEED. THROUGH POOR COPY

objection of the defendant that on the 13th day of March, A. D. 1899, that he ordered and directed Lone Bear and another policeman to arrest your pe' for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action that at the time the defendant, John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude, and actions of John Kills Back, that he had a design to take away his life or to do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable even though it might afterwards turn out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done."

3d. The court erred in refusing to charge the jury and give the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the known habits, customs, and education of the
41 Indians on the reservation from which they came and where they lived, and also the fact, if you shall find it from the evidence in this action, that the defendant had been told presently before the killing that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time that he fired the shot that killed the deceased."

5th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger or that he was in imminent danger of suffering great bodily injury."

6th. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

And thereupon the court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to go and make the attempt to arrest the defendant. The defendant had no right to resist him.

42 "I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency.

"The deceased had a right to show his revolver. I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words capital punishment."

7th. To each of which said instructions by the court the defendant, before the jury retired, then and there duly excepted, and now here assigns the same for error.

8th. The court erred in adjudging the death penalty against this defendant by its judgment and sentence upon the verdict of the jury in this case.

Wherefore the said John Bad Elk prays that the said judgment and sentence of the said circuit court of the United States for the district of South Dakota be reversed and set aside.

S. B. VAN BUSKIRK,
Attorney for Plaintiff in Error, Sioux Falls, South Dakota.

(Endorsed:) Filed May 19, 1899. Oliver S. Pindar, clerk.

43 And afterwards, to wit, on the same day, said defendant files his petition for a writ of error, whereupon an order was made and entered of record allowing the writ of error as prayed for, which said petition for a writ of error and order allowing same is in words and figures the following, to wit:

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Petition for writ of error.

To the honorable circuit court of the United States for the district of South Dakota:

Your petitioner, John Bad Elk, the defendant above named, respectfully shows to this court, and alleges, that at the April term of

44 said court, A. D. 1899, the grand jury duly empanneled and sworn in the district court for said district, at said April term, returned an indictment into said district court, which was filed in the office of the clerk of said court, charging your petitioner with having wilfully and feloniously, and of his malice aforethought, murdered and killed one John Kills Back, on the 13th day of March, A. D. 1899, at the Rosebud Indian Reservation, in said district; that upon the return and filing said indictment as aforesaid, upon motion of the United States Attorney for said district, the said cause was transferred to the United States circuit court aforesaid for trial; that thereafter your

BLEED. THROUGH POOR COPY

petitioner was arraigned upon said indictment, and plead not guilty thereto.

That on the 14th day of April aforesaid said cause came on to be tried before said court and a jury; that upon the conclusion of said trial the jury empanneled therein, after hearing the testimony offered on said trial, the argument of counsel for the respective parties, and the instructions of the court, retired, and, after due deliberation, returned into said circuit court a verdict of guilty, without any recommendations or qualifications. That thereafter, and on the 18th day of April aforesaid, your petitioner presented his motion in arrest of judgment and sentence on said verdict in said action, which motion was overruled by said court; to which ruling of said court denying said motion your petitioner then and there duly excepted, which exception was by the court duly allowed.

That on the 19th day of April aforesaid the judge of said court pronounced the judgment and sentence of said court on said verdict in said action, adjudging and directing that your petitioner, on the 16th
45 day of June, A. D. 1899, be executed by the marshal of said district by hanging by the neck until your petitioner be dead.

That on the trial of said action errors of law were committed and occurred therein, to which your petitioner then and there duly excepted as follows, to wit:

The said court erred in allowing one C. J. Gleason, a witness on the part of and in behalf of the prosecution to testify on said trial, against the objection of your petitioner; that on the 13th day of March, A. D. 1899, he orally, and not by virtue of any writing or process issued by any court or tribunal, ordered and directed two policemen, Lone Bear and another Indian, to arrest your petitioner, for some act or omission alleged to have been committed on the 8th day of March, A. D. 1899.

That said court erred in refusing to give certain instructions to the jury at the request of your petitioner, to which refusal of said court to give said instructions your petitioner then and there duly excepted.

That said court erred in giving certain instructions on its part to said jury, to which error on the part of the said court in giving said instructions your petitioner then and there duly excepted.

And further, that there is no law or statute of the United States under which your petitioner, for said offense charged in said indictment (he being an Indian of the Sioux Tribe of Indians, of the Pine Ridge Indian Reservation, and under the control and guardianship of the United States) can be adjudged or sentenced to suffer the death penalty, and that said judgment and sentence is void for want of jurisdiction to pronounce the same by said court in this case.

That the errors occurring on said trial are more particularly set forth in the assignment of errors in this action, which assignment of errors is herewith filled and made a part of this petition.

46 Wherefore, now, at the April term of said court, A. D. 1899, your petitioner prays this honorable court that a writ of error may be allowed in this case; that the record therein be certified to the Supreme Court of the United States, to the end that said errors may be reviewed by said court, and that the judgment and sentence of the said

And thereupon the court charged the jury, among other things, as follows:

"The deceased, John Kills Back, had been ordered to go and make the attempt to arrest the defendant. The defendant had no right to resist him.

42 "I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency.

"The deceased had a right to show his revolver. I say to you, also, that if you find him guilty you have a right to qualify your verdict by adding thereto the words capital punishment."

7th. To each of which said instructions by the court the defendant, before the jury retired, then and there duly excepted, and now here assigns the same for error.

8th. The court erred in adjudging the death penalty against this defendant by its judgment and sentence upon the verdict of the jury in this case.

Wherefore the said John Bad Elk prays that the said judgment and sentence of the said circuit court of the United States for the district of South Dakota be reversed and set aside.

S. B. VAN BUSKIRK,
Attorney for Plaintiff in Error, Sioux Falls, South Dakota.

(Endorsed:) Filed May 19, 1899. Oliver S. Pindar, clerk.

43 And afterwards, to wit, on the same day, said defendant files his petition for a writ of error, whereupon an order was made and entered of record allowing the writ of error as prayed for, which said petition for a writ of error and order allowing same is in words and figures the following, to wit:

UNITED STATES OF AMERICA
vs.
JOHN BAD ELK. } Petition for writ of error.

To the honorable circuit court of the United States for the district of South Dakota:

Your petitioner, John Bad Elk, the defendant above named, respectfully shows to this court, and alleges, that at the April term of

44 said court, A. D. 1899, the grand jury duly empanneled and sworn in the district court for said district, at said April term, returned an indictment into said district court, which was filed in the office of the clerk of said court, charging your petitioner with having wilfully and feloniously, and of his malice aforethought, murdered and killed one John Kills Back, on the 13th day of March, A. D. 1899, at the Rosebud Indian Reservation, in said district; that upon the return and filing said indictment as aforesaid, upon motion of the United States Attorney for said district, the said cause was transferred to the United States circuit court aforesaid for trial; that thereafter your

BLEED. THROUGH POOR COPY

petitioner was arraigned upon said indictment, and plead not guilty thereto.

That on the 14th day of April aforesaid said cause came on to be tried before said court and a jury; that upon the conclusion of said trial the jury empanneled therein, after hearing the testimony offered on said trial, the argument of counsel for the respective parties, and the instructions of the court, retired, and, after due deliberation, returned into said circuit court a verdict of guilty, without any recommendations or qualifications. That thereafter, and on the 18th day of April aforesaid, your petitioner presented his motion in arrest of judgment and sentence on said verdict in said action, which motion was overruled by said court; to which ruling of said court denying said motion your petitioner then and there duly excepted, which exception was by the court duly allowed.

That on the 19th day of April aforesaid the judge of said court pronounced the judgment and sentence of said court on said verdict in said action, adjudging and directing that your petitioner, on the 16th
45 day of June, A. D. 1899, be executed by the marshal of said district by hanging by the neck until your petitioner be dead.

That on the trial of said action errors of law were committed and occurred therein, to which your petitioner then and there duly excepted as follows, to wit:

The said court erred in allowing one C. J. Gleason, a witness on the part of and in behalf of the prosecution to testify on said trial, against the objection of your petitioner; that on the 13th day of March, A. D. 1899, he orally, and not by virtue of any writing or process issued by any court or tribunal, ordered and directed two policemen, Lone Bear and another Indian, to arrest your petitioner, for some act or omission alleged to have been committed on the 8th day of March, A. D. 1899.

That said court erred in refusing to give certain instructions to the jury at the request of your petitioner, to which refusal of said court to give said instructions your petitioner then and there duly excepted.

That said court erred in giving certain instructions on its part to said jury, to which error on the part of the said court in giving said instructions your petitioner then and there duly excepted.

And further, that there is no law or statute of the United States under which your petitioner, for said offense charged in said indictment (he being an Indian of the Sioux Tribe of Indians, of the Pine Ridge Indian Reservation, and under the control and guardianship of the United States) can be adjudged or sentenced to suffer the death penalty, and that said judgment and sentence is void for want of jurisdiction to pronounce the same by said court in this case.

That the errors occurring on said trial are more particularly set forth in the assignment of errors in this action, which assignment of errors is herewith filled and made a part of this petition.

46 Wherefore, now, at the April term of said court, A. D. 1899, your petitioner prays this honorable court that a writ of error may be allowed in this case; that the record therein be certified to the Supreme Court of the United States, to the end that said errors may be reviewed by said court, and that the judgment and sentence of the said

PAGES MISNUMBERED

circuit court pronounced against your petitioner herein be reversed and set aside and declared void, and your petitioner ever pray.

JOHN BAD ELK,
Defendant.
By S. B. VAN BUSKIRK,
His Counsel.

S. B. VAN BUSKIRK,
of Counsel:

And now, at the April term of said circuit court of the United States, to wit, on the 19th day of May, A. D. 1899, being at the term of said court at which said judgment and sentence was pronounced, it is ordered that said writ of error be, and the same hereby is, allowed as prayed for.

JOHN E. CARLAND,
Judge of Said Court Presiding.

(Endorsed:) Filed May 19, 1899. Oliver S. Pendar, clerk.

47 UNITED STATES OF AMERICA, *Eighth Judicial Circuit, Circuit Court of the United States, District of South Dakota, ss:*

I, Oliver S. Pendar, clerk of said circuit court, do hereby certify and return to the honorable the United States Supreme Court that the foregoing, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and complete transcript of the records, indictment, order remitting the same from the district court, arraignment, plea, orders, sentence, bill of exceptions, and all other proceedings in the case of the United States of America vs. John Bad Elk, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in the district of South Dakota, this 28th day of June, A. D. 1899.

[SEAL.] OLIVER S. PENDAR, *Clerk.*

(Return made at cost of U. S. by order of court; hence no int. rev. stamp necessary to above certificate.)

(Indorsed:) United States vs. John Bad Elk. Return to U. S. Supreme Court from circuit court, dist. of South Dakota.

(Indorsement on cover:) File No. 17464. South Dakota C. C., U. S. Term No. 350. John Bad Elk, plaintiff in error, vs. The United States. Filed July 15, 1899. Office Supreme Court of U. S. Received Jul' 15, 1899.

BLEED. THROUGH POOR COPY